SIM KIM SAM v. FONG AH YIN & ORS.

[O.C.J. (George J.) December 16, 1981]
[Kuala Lumpur — Civil Suit No. 780 of 1972]

Labour Law — Injury to workman — Liability of contractor and foreman — Negligence of contractor — Damages.

In this case the first defendant had successfully tendered to do certain works for the third defendants. The works included the removal and replacement of a bullwheel on one of the dredges of the third defendants. The first defendant engaged the second defendant as foreman and a number of workmen including the plaintiff. The plaintiff was injured in an accident which occurred when the sling which bore the full weight of the bull wheel snapped and the wheel fell causing injury to the plaintiff as a result of which his left leg had to be amputated.

Held: (1) both the second defendant and the plaintiff were at all relevant times the servants of the first defendant, the second defendant as the foreman in charge of the gang of workmen installing the bull wheel and the plaintiff as an apprentice fitter working as such under the supervision of the second defendant;

(2) the steel rope used by the second defendant was supplied to him by the dredge master and it snapped or parted in the middle of the loop between the two spokes because it was not of an adequate strength to maintain a lift of 8 tons;

(3) the second defendant had a duty towards the plaintiff to use ordinary care and skill in carrying out his duties as foreman in charge. In the circumstances of this case he could not be said to be negligent. It would be contrary to all reason and justice to hold a workman, who reasonably relied on his employer's representations, liable in negligence for not having the skill and knowledge of an engineer;

(4) the first defendant was negligent in giving the instructions to the second defendant that resulted in the inadequate steel rope being used, the snapping of which caused the wheel to fall and injure the plaintiff;

(5) in this case the dredge master functioned as far as the first defendant and the works undertaken by him were concerned as a sort of storekeeper. He was asked for a 7/8 inch steel rope sling and he supplied this. There was no suggestion that the sling supplied was defective;

(6) the third defendants were not involved in any way in the installation of the bull wheel or other works that were the subject matter of the contract with the contractor other than that they were obliged to make available certain equipment to the contractors, the first defendants, which included the sling. The third defendants had parted with overall responsibility for the installation works to the first defendant and they must be absolved of any contribution in negligence;

(7) the damages awarded would be —

$18,000 for loss of earnings up to date of judgment;

$24,000 for future loss of earnings;

$38,000 for compensation for pain and suffering.

Cases referred to:-

(1) *Heaven* v. *Pender* [1881-5] All E.R. 35, 39.
(2) *Donoghue* v. *Stevenson* [1932] A.C. 562.
(3) *Mc Ardle* v. *Andmac Roofing Co.* [1967] 1 All E.R. 583.
(4) *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] 2 All E.R. 294.
(5) *Harmer* v. *Cornelius* (1858) 5 C.B.N.S. 236, 246.
(6) *Harvey* v. *R.G. O'Dell Ltd.* [1958] 1 All E.R. 657, 667.

CIVIL SUIT.

G.T.S. Sidhu for the plaintiff.

Wong Soon Foh for the 1st defendant.

Datuk Morris Edgar for the 3rd defendant.

2nd defendant in person.

George J.: The first-named defendant (hereinafter referred to as "the Contractor") had successfully tendered to do certain works for the third-named defendant (who are also the second-named Third Party) (hereinafter referred to as "Southern"). The works included the removal and replacement of a bullwheel on one of the dredges of Southern at their Tanjong Tualang tin field. From the letter of acceptance of the tender which is at page 2 of the Agreed Bundle of Documents AB1 it is seen that the contract was a lump sum contract and it was agreed between the parties that for the execution of the works "only the following items will be supplied by the Company (Southern): Oxygen, Accetylene, Bolts, Nuts, Pivots, lifting gear and slings."

To instal it, the bullwheel had to be lifted by means of a crane or hoist off the deck of the dredge and eased into position onto a shaft. A length of "rope", made from strands of steel wire, with an "eye" spliced into each end was used as a sling by looping it round two of the spokes of the wheel and passing both ends over the rim of the wheel. The hook of the hoist that was to lift the wheel was then passed through both the "eyes". The hoist was then set into operation and the wheel was lifted off the deck slung on the sling.

The accident occurred as the plaintiff and other workmen under the supervision of one Ho Hoong Seong, the second-named defendant, (who is also the first-named Third Party) were about to ease the bullwheel which was suspended on the sling about two inches off the deck, into position onto the shaft. The sling, which bore the full weight of the bullwheel, snapped and the wheel fell causing injury to the plaintiff as a result of which his left leg had to be and was amputated.

The plaintiff has brought this action for damages against Southern, the Contractor and Ho Hoong Seong contending that one or more of them are liable to him in damages for negligence and/or for breach of the statutory duty imposed by section 14 of the Factories and Machinery Act 1967.

Patrick John Price who gave evidence for Southern was the Manager of the mine and was at the scene immediately after the accident. He explained that when the bullwheel was hoisted up, the steel rope used as a sling would slide up and be taut under great pressure (because of the weight of the wheel) against the spokes of the wheel which had edges that were right-angled and as such comparatively sharp. It was important therefore that not only should a steel rope of sufficient strength be used as a sling but that gunny sacking be used as lagging so that the steel rope would not come into direct contact with the sharp edges of the spokes. If sufficient lagging was not used there was the danger that the steel rope would be cut through by the sharp edges of the spokes.

Price further testified that when he rushed up to the scene of the accident immediately after it had occurred he noticed that not only was the steel rope used as the sling, not of sufficient strength but that the lagging used was insufficient. He said that the steel rope used was a 7/8th inch rope which in his

opinion was undersized for a lift of 8 tons which he testified was the weight of the bullwheel. He also maintained that the steel rope could not have been supplied by Southern as it was a type of steel rope not used by his company.

Ho Hoong Seong (the second-named defendant) was called by the Contractor. He testified that the sling that was used was supplied by Southern's Dredge Master. He went on to say, "When I asked for the sling I told him (the dredge master) the purpose for which it was needed. I considered that it was fit for use." Ho further testified that he had been told by the Contractor that the weight of the bullwheel was 6 tons and that he was to use a steel rope of 7/8th inch diameter which he was to obtain from the dredge master.

The first matter that I should get out of the way is to make a finding as to whose servant the plaintiff was at the relevant time. The plaintiff had pleaded that at all relevant times "he was the servant of all the three defendants or one or other of them." The Contractor had in turn contended in his statement of defence that the plaintiff was the servant of Ho, who it was alleged was an independent contractor employed by Southern (which Southern had denied). Ho did not file a statement of defence.

However, when the relevant evidence was adduced it became clear (and Encik Wong Soon Foh of counsel for the Contractor in his final address conceded as much) and it is my finding, that both Ho and the plaintiff were at all relevant times not only employees of but functioned as servants of the Contractor, Ho as the foreman (Kepala) in charge of the gang of workmen installing the bullwheel and the plaintiff as an apprentice fitter working as such under the supervision of Ho.

Now the contention of Encik G.T.S. Sidhu is that whatever might have been the contractual relationship between the parties each of the defendants should bear a measure of liability for the damage suffered by the plaintiff in that each of them had contributed in negligence that resulted in the accident occurring.

The cause of the accident was the snapping of the steel rope sling while the bullwheel was suspended a couple of inches above the deck of the dredge. What follows from this is for me first of all to make a finding as to whether the steel rope snapped because it was inadequate or because of insufficient lagging being used or a combination of both those factors.

The plaintiff testified that there was no lagging at all. Price however had noticed that there was some lagging used but was of the view that it was insufficient to avert the danger of the sharp edges of the spokes cutting through the rope. But Ho insisted that there had been sufficient lagging made up of gunny sacks and wooden wedges. Ho also testified that the steel rope parted between the spokes — "The loop round the two spokes snapped in the middle between the two spokes" and not where the steel rope was in contact with one of the spokes. There was no other evidence on this point and I am led to the conclusion that the rope snapped not because the edges of the spokes had cut through the rope. Whether there was any or any sufficient lagging thus became a matter of academic interest only.

It is a common ground that the steel rope used was of 7/8th inch diameter. In the absence of evidence (or even any serious contention) to the contrary I accept Price's evidence that the weight of the bullwheel was 8 tons as well as his opinion that a 7/8th inch rope was not strong enough for a lift of 8 tons. Ho's evidence was that his employer the Contractor had told him that the bullwheel weighed 6 tons and that he was to use a 7/8th inch steel rope as a sling. His employer had apparently told him that such a sling was strong enough for a lift of 15 tons. He was a skilled workman but admitted that he did not know how to make the necessary calculations to decide on the thickness of steel rope to be used. Quite obviously he had to and had accepted his employer's opinion that a 7/8th inch rope was adequate for the job. It is significant that the Contractor had chosen not to lead evidence on the issue of the adequacy of the sling that was used.

I also consider it significant that the dredge master who was alleged to have issued the sling was not called and I found myself on the basis of the available evidence inclined to and accepted Ho's contention that the sling used was supplied by the dredge master.

It is my finding then that the steel rope used by Ho was supplied to him by the dredge master and that it had snapped or parted in the middle of the loop between the two spokes because it was not of an adequate strength to maintain a lift of 8 tons.

As far back as 1883 in *Heaven* v. *Pender*[1] (line 1) Sir Baliol Brett M.R. said in the dissenting judgment of the Court of Appeal

"... whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In that same case Cotton L.J. seems to have considered that the principle laid down by the Master of the Rolls was untenable as being unnecessarily wide. However, that principle laid down by Brett M.R. (who later became Lord Esher) was picked up, developed and established in *Donoghue* v. *Stevenson*[2] and thereafter applied in any number of cases including *McArdle* v. *Andmac Roofing Co.*[3] and *Home Office* v. *Dorset Yacht Co. Ltd.*[4] which were cited by Encik G.T.S. Sidhu.

The defendant Ho clearly had a duty towards the plaintiff to use ordinary care and skill in carrying out his duties as the foreman in charge. But the care and skill would have to be within the limits of his own expertise and knowledge. The ratio of *Harmer* v. *Cornelius*[5] and in *Harvey* v. *R.G. O'Dell, Ltd.*[6] can be extended to support this view. If for instance he had given instructions for the hoist to haul up the bullwheel before the hook was properly in place in both the "eyes" of the sling and as a result of that there was a slip, he would clearly have been negligent. If no lagging or insufficient lagging

was used and that caused the accident he would have been negligent. But when he did not have the knowledge (and could not reasonably have been expected to have such knowledge) to ascertain the strength of the steel rope that ought to be used and reasonably relied on the representations made by his employer that a 7/8th inch steel rope could be used to lift a dead weight of 15 tons and as instructed by his employer used a 7/8th inch steel rope, in my view although such a rope turned out to be inadequate, Ho cannot be said to have been negligent. It would surely be contrary to all reason and justice to hold a workman (who reasonably relies on his employer's representations) liable in negligence for not having the skill and knowledge of an engineer.

I next consider the position of the Contractor. Clearly he was negligent in giving the instructions to Ho that resulted in the inadequate steel rope being used, the snapping of which caused the wheel to fall and injure the plaintiff.

Now for the position of Southern.

In *McArdle* v. *Andmac Roofing Co., supra,* a company called Pontin (Contractors) Ltd. with one Armistead, a constructional engineer in charge, had the conduct of certain roofing works. One Newton supplied workmen to Armistead to lay, on the rafters of the building that was to be roofed, certain joists and boards on which a firm of roofing specialists called Andmac were to apply felt and bitumen.

Armistead directed when and where Newton's men were to work and there was some evidence that he directed the detail or manner in which it was to be done.

The plaintiff McArdle was one of Andmac's men applying bitumen to the boards laid by Newton's men. Newton's men left the roof for a break without informing Andmac's men and without leaving a barrier, however temporary, to protect the large hole which still remained uncovered. McArdle worked on and fell through the hole and suffered injuries. Pontin, Newton and Andmac were each held to be one-third to blame for the accident.

In the course of his judgment, Davies L.J. said (at page 589),

"One cannot help to some extent comparing the position of Pontin, as it was sought to be put forward on their behalf, with the position of an ordinary private householder. If a private householder employs two firms of contractors — say roofing contractors and painters — to work together, he would of course be under a similar duty; but his duty would in the ordinary case, one apprehends, be discharged by informing the contractors of any special danger of which he knew and the contractors might not know. In the ordinary way he could probably rely on the skill and judgment of the contractors, not being himself in a position to deal with safety matters. Here, however, the position was quite different. It would be quite wrong to equate the position of Pontin with that of an ordinary private householder. It is quite impossible, in the circumstances of this case, to say that Pontin were taking reasonable steps to fulfil their duty by relying on the skill and judgment of Andmac or Newton; for it is clear that Mr. Armistead, the representative of Pontin and an engineer of some forty-two years, experience, was really personally directing operations."

And Edmund Davies L.J. said (at page 591),

"Finally, as to Pontin. Their position gives rise to different and rather more difficult questions than those of the other two defendants. Somewhat faint-heartedly, it was submitted that they owed no duty of any kind to the plaintiff; that submission must be rejected. More substantially, it was argued that, assuming a duty existed, Pontin were not in breach of it. It is, therefore, important to consider the role played by the witness, Mr. Armistead.... He not only engaged the sub-contractors but directed all the work that they were to do and when they were to do it, and in some instances gave orders how it was to be done. He conceded that he was the co-ordinating authority to bring together the various sub-contractors at the right time and the right place. With the exception of Andmac and one other, all sub-contractors (including Newton) were engaged to supply labour only, any materials needed being furnished by Pontin. Safety precautions were never discussed with any sub-contractor. Although Mr. Armistead said that he regarded the small firm of Newton as under a duty to fence off holes such as the one which caused this accident, he never indicated to them that, if for this purpose they needed any material, this was available to them on the site. He simply expected them to make such safety arrangements as they thought fit. He was perfectly aware that Newton's men would be working in close proximity to Andmac's men and that it was important that the 'Stramit' boards should be covered up quickly, yet Mr. Armistead left it entirely to these sub-contractors to devise their own methods of safety. I would adopt the submission of counsel for Andmac that in the Pontin concern there was, as he put it, no horizontal organisation and no vertical management."

In the instant case the dredge master, it seems to me, functioned, as far as the Contractor and the works undertaken by the Contractor were concerned, as a sort of storekeeper. He was asked for a 7/8th inch steel rope sling. Southern would have been negligent if the sling supplied had a diameter of less than 7/8th inch or was defective. What was supplied was a 7/8th inch steel rope and there is no suggestion that the sling supplied was defective.

There was a suggestion by counsel that the provisions in the contract for the supply by Southern of the equipment was to ensure that proper and safe equipment was used. Price denied this. He contended, and I accept what he said, that the reason that equipment was to be made available by Southern was because in any event all the items would have been available on the dredge and there was no need for the Contractor to bring to the dredge what was available.

It seems to me that Southern's position is nearer that of the householder referred to by Davies L.J. in the *McArdle* case than Pontin. If, for instance, the deck of the dredge was inclined to be slippery which fact was not obvious and the attention of the Contractor or his men was not drawn to that condition and that resulted in or contributed to the accident happening Southern could have been said to have contributed in negligence.

Southern was not involved in any way in the installation of the bullwheel or other works that was the subject-matter of the lump sum contract with the Contractor other than that they were obliged to make available certain equipment to the Contractor which included the slings. In a practical sense, as I see it, Southern had parted with over-all responsibility for the installation works to the Contractor (which, as Sellers L.J. observed in the *McArdle* case, was not done by Pontin).

I am constrained to and do absolve Southern of any contribution in negligence.

The plaintiff was 24 years of age when the accident occurred. He was an unskilled workman and

had been employed as an apprentice fitter by the Contractor about two weeks prior to the accident at a daily wage of $7 which for a 25-day month would be $175. He had more than a basic education and would no doubt have advanced into a fully-pledged skilled workman if not for the loss of his leg. He was unemployed for about 2 years after the accident and thereafter earned a living as an unqualified teacher. At the date of trial he earned $170 a month in a temporary job as a kindergarten teacher.

For loss of earnings I would award the plaintiff $4,200 for the first two years after the accident on the basis of $175 per month, $6,600 for the next 5 years at $110 per month, $7,200 for the next 3 years at $200 per month that would more or less bring up up to the date of judgment. The future loss of earnings should also be calculated on the basis of a loss of $200 per month for 14 years which using the annuity tables gives the rounded off amount of $24,000.

As compensation for pain and suffering and loss of the usual amenities I agree with all three counsel that $38,000 would be fair.

Accordingly there will be judgment against 1st named defendant in the sum of $80,000 together with interest on the actual loss of earnings calculated at 6% per annum from the dates they were deemed to have been accrued (taking it on a yearly basis) until judgment and thereafter and until realisation at 8% per annum, on the future loss of earnings at 8% per annum from date of judgment until realisation and on the $38,000 for pain and suffering at 4% per annum from the date of service of the writ on the 1st defendant until judgment and thereafter at 8% until realisation.

The 1st defendant will also pay the costs taxed by the proper officer of the court of each the plaintiff and the 3rd defendant.

Order accordingly.

Solicitors: *Khoo & Sidhu; Chooi & Co.; Morris Edgar & Clough Thuraisingham.*

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. MALAYSIAN AIRLINES SYSTEM BHD.

[O.C.J. (Mohamed Azmi J.) December 23, 1981]

[Kuala Lumpur — Civil Suit No. 1205 of 1978]

Equity — Assignment — Equitable assignment — Civil Law Act, 1956, s. 4(3).

In this case the plaintiff sued the defendant as assignee of a debt due from the defendant to Bahagia Trading Sdn. Bhd. in respect of certain contracts made between Bahagia and the defendant. Bahagia had agreed to assign and transfer absolutely to the plaintiff the whole of the moneys due and payable to it from the defendant under the said contracts as a consideration of and a further collateral security for a loan of $400,000 granted to it by the plaintiff. An assignment deed was executed by the plaintiff and forwarded to the defendant who signed it. The deed had not then been signed by Bahagia but was signed later. The issue in this case was whether there was an equitable assignment and if so whether it was effective before the defendant made the payments to Bahagia.

Held: (1) the plaintiff could not have succeeded if it were to prove its claim under legal assignment as no statutory notice was given to the defendant as stake-holder as required by section 4(3) of the Civil Law Act, 1956;

(2) once there was a clear intention on the part of Bahagia, the assignor, that the defendant should get the benefits of the MAS contract by conveying such intention to the plaintiff, an equitable assignment was created and when the defendant became aware of it, it became a trustee for the plaintiff in respect of the moneys due under the contract to Bahagia and the defendant as a debtor or stake-holder is liable to pay the sums due to the plaintiff, although it had paid the sums to Bahagia, albeit in breach of trust;

(3) the mere fact that there is still something to be done between the assignor and the assignee regarding the assignment such as to formalise the assignment in a deed or the fact that goods under the MAS contract had not been fully supplied, did not bar the creation of an equitable assignment, once the debtor or stakeholder came to know or had acknowledged it;

(4) the failure to join the assignor as a party was, in the circumstances of the case, not fatal to the plaintiff's claim.

Cases referred to:-

(1) *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* [1905] A.C. 454.

(2) *James Talcott Ltd.* v. *John Lewis & Co. Ltd.* [1940] 3 All E.R. 592.

(3) *Rossiter* v. *Miller* [1878] 3 A.C. 1124, 1151.

(4) *Palmer* v. *Culverwell Brooks & Co.* (1902) 85 L.T. 758 & 759.

(5) *In re Patrick* [1891] 1 Ch. 82.

(6) *Malayawata Steel Bhd.* v. *Government of Malaysia* [1980] 2 M.L.J. 103.

(7) *Sanders & Co.* v. *Peek* (1884) 50 L.T. 630.

[The following cases were also cited in argument:— *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765; *Williams* v. *Atlantic Assurance Co. Ltd.* [1933] 1 K.B. 81 C.A.; *In re Steel Wing Co. Ltd.* [1921] 1 Ch. 349; *Walter & Sullivan Ltd.* v. *J. Murphy & Sons Ltd.* [1955] 2 W.L.R. 919; *Johnstone* v. *Cox* (1881) 19 Ch. 17; *Brice* v. *Bannister* (1878) 3 Q.B.D. 569; *Johara Bi binte Abdul Kadir Marican* v. *Lawrence Lam Kwok Fou & Anor.* [1981] 1 M.L.J. 139; *United Overseas Bank Ltd.* v. *Singapore Engineers Ltd.* [1966] 2 M.L.J. 267; *Bateman & Anor.* v. *Hunt & Ors.* [1904] 2 K.B. 530; *Bickerton* v. *Walker* (1885) 31 Ch. 151.

CIVIL SUIT.

C. V. Das for the plaintiff.

Chin Yew Meng for the respondent.

Mohamed Azmi J.: This is a claim by Malaysian International Merchant Bankers Berhad (MIMB) as assignee of a debt due from Malaysian Airlines System Berhad (MAS) to Bahagia Trading Sdn. Bhd., in respect of certain contracts, the particulars of which are contained in Exhibits AB8 to AB11, and summarised in paragraph 3 of MAS' Statement of Defence. Although the claim is for the sum of $64,542, it is now conceded by the plaintiff that from the particulars of payments made by MAS to Bahagia/Assignor, only the sum of $62,358 can be due and payable to MIMB under the deed of assignment dated March 18, 1976. (See Exhibits AB1 to AB12). In the circumstances, if MAS were liable under legal or equitable assignment as a debtor or stake-holder, the plaintiff could only obtain judgment in the sum of $62,358 and not $64,542.

At the commencement of these proceedings, certain agreed issues of facts and law are recorded for the determination of the court. On facts, the only issue for determination is whether, when the 1976